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shipments of oil. The railroad brought suit to enjoin this order and a federal court issued the writ. *Held*, that the order was *ultra vires*, and the injunction was properly issued. *United States* v. *Pennsylvania R. Co.*, U. S. Sup. Ct., Oct. Term, 1916, Nos. 340 and 341.

For a discussion of this case, see NOTES, p. 381.

INTERSTATE COMMERCE — RECOVERY IN STATE COURT FOR INDIRECT DAMAGE TO BUSINESS DUE TO ILLEGAL OVERCHARGE — FEDERAL REMEDY EXCLUSIVE. —The defendant railroad, in interstate business, collected from the plaintiff a charge in excess of that provided for by the Interstate Commerce Commission. As reparation therefore, the commission had ordered the railroad to pay the plaintiff $6198, which was done. The present action is brought in a Kentucky court under the common law to recover for additional damage done the plaintiff's business as a result of the overcharge. *Held*, that the plaintiff cannot recover. *Louisville, etc. R. Co.* v. *Ohio Valley Tie Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 66.

It is axiomatic that where Congress, under the power reserved to it in the federal Constitution, legislates in regulation of interstate commerce, the laws of the several states covering the same field, whether formally abrogated or not, cease to have any force. See *Gibbons* v. *Ogden*, 9 Wheat. (U. S.) 1, 210; *Missouri, etc. Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *Reid* v. *Colorado*, 187 U. S. 137, 146. The sole question presented by the principal case is whether or not Congress has by the Interstate Commerce Act taken over the entire field of relief for violations of that Act, or has provided merely for the refunding of the overcharge and certain penalties, leaving to the several states the matter of redress for general damage resulting to the plaintiff's business. The Supreme Court of Kentucky took the latter view. *Louisville, etc. R. Co.* v. *Ohio Valley Tie Co.*, 161 Ky. 212, 170 S. W. 633. By § 8 of the Act it is provided that in case of a violation of its provisions "such common carrier shall be liable . . . for the full amount of damages sustained in consequence of any such violation." And § 9 provides that the remedy is to be sought before the Commission or a federal court. So it has been held that the Commission has jurisdiction to give whatever damage the plaintiff has actually suffered. *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 202, 203; *Meeker* v. *Lehigh Valley Coal Mining Co.*, 236 U. S. 412, 429. And the Act, and not the common law, determines the extent of the damages. *Pennsylvania R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 472. And § 16 further provides that in case an order by the Commission to pay money remains unpaid, suit thereon may be brought in a state court, inferentially declaring that suit would not lie where the order had been performed. These sections seem to indicate a clear purpose by Congress to commit to the Commission and federal courts the entire field of redress for violations of the Act.

JUDGMENTS — *RES JUDICATA* — CRIMINAL LAW — FORMER JEOPARDY — JUDGMENT ON PLEADING A BAR TO SECOND PROSECUTION. — A defendant, indicted for conspiracy to violate the Federal Bankruptcy Act, pleaded the special statute of limitations provided in that act. The plea was sustained. A later decision, in other proceedings, took the offense of conspiracy outside the operation of this special bar. A second indictment being brought, the defendant pleaded in bar the earlier judgment in his favor. The lower court sustained this plea. The government thereupon brings a writ of error. *Held*, that the plea was good. *United States* v. *Oppenheim*, U. S. Sup. Ct., Oct. Term, 1916, No. 412.

Except under statutes, no similar case on a judgment on a plea to the indictment seems to have arisen. It has been held, however, that a new indictment is not barred by a judgment sustaining a demurrer going to the merits

of a previous indictment on the same facts. *People* v. *Gluckman*, 60 App. Div. 307, 70 N. Y. Supp. 173. *Cf. Commonwealth* v. *Willcox*, 111 Va. 849, 69 S. E. 1027; *Bowman* v. *Commonwealth*, 146 Ky. 486, 143 S. W. 47. See 2 VAN FLEET, RES JUDICATA, 1242. These decisions are based on the fact that there had been no former jeopardy, for the defendant had not yet been put on trial upon any issues of fact. *Cf. Taylor* v. *United States*, 207 U. S. 120; *People* v. *Stanton*, 84 Misc. 101, 146 N. Y. Supp. 862. In civil actions such a judgment would however operate as *res judicata*. *Gould* v. *Evansville, etc. R. Co.*, 91 U. S. 526, 534. *Contra*, *State of Arkansas* v. *Gill*, 33 Ark. 129, 132. But the application of this doctrine to criminal law is apparently new. Nothing under that name, distinct from former jeopardy, has been hitherto recognized. At most the term has been used to extend the doctrine of former jeopardy to summary proceedings. *Cf. Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378, 381. But former jeopardy is only a variant of the same fundamental principles of justice and expediency that lie behind *res judicata*. See *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378, 381. Yet jeopardy sufficient to create a defense to subsequent action is generally only reached subsequent to judgments on the pleadings. *Cf. Taylor* v. *United States*, *supra; Kepner* v. *United States*, 195 U. S. 100, 128. As there is no basis for this failure to protect a criminal after a judgment on a demurrer or plea to the indictment, it seems but equitable to apply the doctrine of *res judicata* to fill the gap. The result of the principal case has been reached by statutes in a number of states. *Cf. Ex parte Hayter*, 154 Cal. 243, 116 Pac. 370, with *State* v. *Fields*, 106 Iowa 406, 76 N. W. 802.

POWERS — SPECIFIC PERFORMANCE — ENFORCEMENT OF CONTRACT TO EXERCISE GENERAL TESTAMENTARY POWER OF APPOINTMENT. — The donee of a general power of appointment to be exercised by will contracted to exercise it by an irrevocable will in favor of the promisee. At the same time he signed a will in accordance with the contract. He later made a new will revoking the former and leaving the property to others. Suit is brought after his death. *Held*, that the contract will not be specifically enforced. *Farmers' Loan & Trust Co.* v. *Mortimer*, 114 N. E. 389 (N. Y.).

Where the owner of property contracts to devise it, specific performance is regularly granted and enforced by imposing a constructive trust on the property in the hands of those to whom it has come at law. *Emery* v. *Darling*, 50 Ohio St. 160, 33 N. E. 715. A general power of appointment is often considered to approximate absolute ownership. See 24 HARV. L. REV. 654. Thus where the mode of execution is unrestricted, a contract to appoint is in equity deemed equivalent to actual appointment. *Johnson* v. *Touchet*, 37 L. J. Eq. 25; *In re Jennings*, 8 Ir. Ch. 421. But a distinction should be made when necessary to fulfill the donor's intention. Now the very purpose of making a power exercisable by will only is to provide freedom of appointment until the donee's death. An irrevocable contract destroys this freedom. Specific performance of it should therefore not be allowed to defeat the rights of those claiming under an exercise of the power as contemplated by the donor. Thus in default of appointment, those entitled under the provisions made by the donor should take over those with whom the donee has contracted. See *Reid* v. *Shergold*, 10 Ves. Jr. 370, 379. So also those prevail who claim under an authorized exercise of the power, although in violation of the contract, and specific performance is not granted. *In re Parkin*, [1892] 3 Ch. 510; *Wilks* v. *Burns*, 60 Md. 64. *Cf. Reid* v. *Boushall*, 107 N. C. 345, 12 S. E. 324. In the case of a special testamentary power it has been held that not even may damages be recovered at law, the contract being considered illegal and void. *In re Bradshaw*, [1902] 1 Ch. 436. See *Palmer* v. *Locke*, 15 Ch. D. 294, 300. This result may be supported on the ground that the power was created primarily for the benefit of a class, to which the donee owes a fiduciary duty, in the nature of a trust, to do nothing in vio-